Supreme Court, U.S.
FILED
APR 29 1997
OFFICE OF THE CLERK

(2)

No. 96-1461
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

**OHIO ADULT PAROLE AUTHORITY, et. al.,**
*Petitioners,*

**v.**

**LARRY LYONS,**
*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

---

# REPLY BRIEF OF PETITIONERS

---

**BETTY D. MONTGOMERY**
Attorney General of Ohio

**JEFFREY S. SUTTON**
State Solicitor
*Counsel of Record*
**SIMON B. KARAS**
Deputy Chief Counsel
**CHARLES L.WILLE**
**STEPHANIE L. HARRIS**
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

**Counsel for Petitioners**

6 pp

## REPLY BRIEF OF PETITIONERS

### I. Only Federal Courts of Appeals, Not District Courts, Have Authority To Issue Binding Certificates of Appealability Under The Act.

**First**, respondent claims (Opp. Br. 3-5) that there is no lower-court conflict of authority on this issue. How remains unclear. The question raised in the petition is "whether courts of appeal have authority to issue certificates of appealability" under the Act. *See* Petition i. On the one side of the issue, appellate courts lack such authority if district courts may enter binding certificates of appealability. But, on the other side, they have such authority if district courts may not enter certificates at all or if they may enter only advisory certificates. As to this point, there clearly is a split. By case law and rule, seven courts of appeal (including the Sixth Circuit in this case) have established that district courts may enter binding certificates of appealability. *See* Petition 6-7. At the same time, three circuits have indicated that district courts may not enter binding certificates of appealability. *Id.*

Notably, respondent does not and cannot dispute this essential point. He instead suggests (Opp. Br. 3-4) that the latter three circuits do not "eliminate district courts in the certification process," and points out that the First Circuit permits district courts to issue advisory certificates and that the Fourth and Eighth Circuits may do so. *But see Hohn v. United States*, 99 F.3d 892 (8th Cir. 1996) (stating that the appeal will not lie unless the circuit court issues the certificate); *Parker v. Norris*, 929 F.Supp. 1190 (E.D. Ark. 1996) (holding that district courts may not play any role in the certificate process). This argument does not help respondent. The principal question is whether the Act vests ultimate gatekeeping authority in the district court or the appellate court. And, on that point, the lower courts are

deeply divided. Implicit in respondent's argument, moreover, is the suggestion that there is something else worth waiting for. So far, every circuit but two has had an opportunity to address the issue by rule or case law. There thus seems little to gain by waiting for input from the D.C. and Third Circuits.

**Second**, respondent concedes the importance of this question. He acknowledges (Opp. Br. 8) that "there are numerous cases which would be affected by this Court's decision" and that the "issue is capable of repetition each time a habeas petition is denied." Nonetheless respondent persists (Opp. Br. 8) that the writ should be denied because the lower courts "have consistently held that the district courts have a role in the certification process" and thus in respondent's view the "issue appears to be settled." As shown, this argument fails to acknowledge the relevant disagreement among the circuits and the remaining uncertainty as to what role if any district courts should play in the process. The argument also fails to acknowledge the difficulty the lower courts have been having in ascertaining the meaning of these conflicting amendments. In this very case, for example, the court of appeals invited "clarification of this statutory conflict." (A-23). Respondent offers no tenable reason why that invitation should not be accepted.

**Third**, respondent offers several arguments on the merits as grounds for denying the writ. In view of the patent lower-court conflict of authority and the conceded importance of the federal question, these contentions merit only brief attention. Respondent initially suggests (Opp. Br. 5-6) that granting district courts authority to issue binding certificates of appealability will in truth serve the Act's goals of streamlining habeas corpus review because the district courts are better situated to ascertain the merits of an appeal. This is only partly true. Having just had a ring-side view of the

proceedings and having just denied the habeas petition, the federal district court judge no doubt enjoys a good perspective on the merits of the appeal. And that perspective may well justify the procedure adopted by the First Circuit of allowing the district court to provide an advisory certificate of appealability upon denying the petition. But these advantages by no means confirm the point respondent needs to make here -- that district courts therefore should be given final authority to issue such certificates. On the contrary, courts of appeals have the best perspective when it comes to making the quintessential legal determination of whether a denied section 2254 petition merits further review, and according to the apparent judgment of Congress are the most likely body to fulfill the goal of weeding out non-meritorious appeals.

Respondent also disputes (Opp. Br. 10) the State's position that 28 U.S.C. §2253 (§102 of the Act) should control over Fed. R. App. P. 22(b), (§103 of the Act), suggesting that the distinction between procedural and jurisdictional provisions advances his position. The distinction may well be important, but in this instance would seem only to help the State. There can be little doubt that the requirement of a certificate of appealability constitutes a jurisdictional prerequisite. Without one, the habeas petitioner cannot proceed; and without one, the court of appeals has no power to release the inmate. Under these circumstances, a rule contradicting a statutory jurisdictional requirement, as here, has no force. In the end, Rule 22(b) cannot be deemed to confer authority upon the district court which is not provided for by §2253. *See Sibbach v. Wilson*, 312 U.S. 1, 10 (1941); *Willy v. Coastal Corp.*, 503 U.S. 131, 134-35 (1992).

**Finally**, respondent agrees with the State that in the event the writ is granted, the case should be consolidated

with *Nagle v. Bailey*, Case No. 96-1443, and set for argument with *Nagle*.

## II. The Act Changes The Threshold Showing For Obtaining A Certificate of Appealability.

Respondent does not dispute the two grounds raised by the State for granting review of the second question presented. He does not challenge the State's contention that a lower-court conflict exists. Nor does he maintain that the question is not an important one.

He instead seems to claim that the court of appeals addressed this issue *sua sponte* in the course of addressing whether the Act applied to habeas claims that had already been filed when the Act went into effect. This is true. The appeal focused on two questions: (1) who is responsible for issuing a certificate of appealability? and (2) does the Act apply to pending claims? As a result, the nature of the threshold showing required under the Act was not a centrally-contested point. The district court did not consider the question because it issued the certificate under prior law. And the court of appeals looked at the question only tangentially in the course of deciding whether to apply the Act to pending claims.

On this record and upon further reflection, we reluctantly agree with respondent that the second question does not merit review. The issue is not concretely presented in this case, it was not argued below, and it has lost its link to the contested question of whether the Act applies to pending cases in view of respondent's decision not to cross-petition that point. Accordingly, while the issue ultimately will merit review by the Court, now does not seem to be the time and this does not seem to be the case.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, we respectfully submit that the writ should be granted on the first question, and the case set for argument with *Nagle v. Bailey*, No. 96-1443.

Respectfully submitted,

**BETTY D. MONTGOMERY**
Attorney General of Ohio

**JEFFREY S. SUTTON**
State Solicitor
*Counsel of Record*
**SIMON B. KARAS**
Deputy Chief Counsel
**CHARLES L.WILLE**
**STEPHANIE L. HARRIS**
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

**Counsel for Petitioners**

Dated: April 29, 1997